

The opinion in support of the decision being entered today was **not** written for publication and is **not** precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PODUTOORI RAVINDER REDDY

Appeal No. 2004-0968
Application No. 09/002,133

ON BRIEF

Before PAK, OWENS, and PAWLIKOWSKI, **Administrative Patent Judges**.

PAWLIKOWSKI, **Administrative Patent Judge**.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 11-26.

On page 7 of brief, appellant groups the claims into four groupings. Group I, claims 11, 12, 20, 22, and 23-26; Group II, claims 13-19; Group III, claim 21; and Group IV, claims 25-26. To the extent that a claim is separately argued, we will

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consider such claim in this appeal. See 37 CFR § 1.192(c)(7) and (8) (2003).

A copy of each of the claims is set forth in the attached appendix.

The examiner relies upon the following references as evidence of unpatentability:

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|--------------------------|-----------|---------------|
| Singer et al. (Singer) | 5,202,146 | Apr. 13, 1993 |
| Heertje et al. (Heertje) | 5,652,011 | Jul. 29, 1997 |

Claims 11-26 stand rejected under 35 U.S.C. § 103 as being obvious over Heertje in view of Singer.

OPINION

For the reasons set forth in the answer, and below, we affirm the rejection.

We refer to pages 3-5 regarding the examiner's position in this rejection.

Appellant does not dispute that Heertje teaches the claimed mesomorphic phase and gelled biopolymer. See pages 8-9 of the brief. Appellant argues that the examiner points to no teaching in Singer indicating that Singer's flavoring system would work if the flavor were incorporated into the gelled biopolymer phase of Heertje's Example 6, for example. Brief, page 8.

However, we find on page 5 of the answer, that the examiner explains that Heertje does teach that a flavor additive is added to the gelled biopolymer phase. See column 9, line 27 of Heertje. As pointed out by the examiner, Singer teaches that the flavoring system of Singer can be used in spreads. The examiner states that Heertje is directed to products such as spreads. Answer, page 6. Hence, we concur with the examiner that it would have been prima facie obvious to have employed the

flavoring system of Singer, as the flavor additive of Heertje, to form spreads, especially, as pointed on by the examiner on page 6 of the answer, since appellant does not provide evidence to rebut the prima facie case of obviousness. Mere attorney argument is not the kind of factual evidence that can rebut the *prima facie* case of obviousness. See In re Wood, 582 F.2d 638, 642, 199 USPQ 137, 140 (CCPA 1978); In re Lindner, 457 F.2d 506, 508, 173 USPQ 356, 368 (CCPA 1972) ("mere lawyers' arguments unsupported by factual evidence are insufficient to establish unexpected results.").

We observe that on page 9 of the brief, that appellant argues claims 13-19, stating that these Group II claims recite a lower level of triplyceride fat in the product or emulsion. We observe that Heertje teaches an amount of less than 20 weight percent fat, and particularly from 0.01 to 2.0 weight percent fat. See column 5, lines 30-42. The disclosed weight percentages encompass the weight percentages set forth in claims 13-19.

With regard to claim 21, appellant argues that claim 21 is directed to an edible plasticized [sic, plastic] spread. As stated by the examiner, Heertje is directed to spreads. For example, see the abstract.

Finally, appellant argues that claims 25 and 26 (Group IV) are patentable for the reasons already discussed in the brief, but do not recite the first surfactant phase. We accordingly affirm the rejection of these claims for the same reasons that we affirmed the rejection of the claims of Group I.

In view of the above, we affirm the rejection.

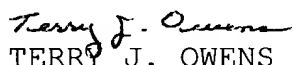
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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

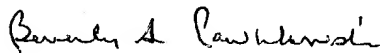
AFFIRMED



CHUNG K. PAK
Administrative Patent Judge



TERRY J. OWENS
Administrative Patent Judge



BEVERLY A. PAWLIKOWSKI
Administrative Patent Judge

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APPENDIX

11. Method for the preparation of a food comprising preparing mesomorphic phase of edible surfactant in a first stream, preparing a gelled biopolymer comprising lipophilic flavor in a second stream and combining said first and second streams to form an edible emulsion.

12. A food comprising an emulsion including a first phase of gelled edible surfactant and a second phase of gelled biopolymer, said second phase comprising triglyceride fat at a level of 5 wt.% to less based on the weight of the emulsion and a lipophilic flavor.

13. The food according to claim 12 wherein said emulsion comprises from 0.1 to 5 wt.% triglyceride fat.

14. The food according to claim 13 wherein said emulsion comprises from 0.2 to less than 5 wt.% triglyceride fat.

15. The food according to claim 14 wherein said emulsion comprises from 0.5 to 3 wt.% triglyceride fat.

16. The food according to claim 15 wherein said emulsion comprises from 1 to 2 wt.% triglyceride fat.

17. The food according to claim 12 comprising from 0.1 to 5 wt.% triglyceride fat, based on the total weight of the food.

18. The food according to claim 17 comprising from 0.2 to less than 5 wt.% triglyceride fat, based on the total weight of the food.

19. The food according to claim 18 comprising from 1-3 wt.% triglyceride fat, based on the total weight of the food.

20. The food according to claim 12 wherein said food is an edible spread.

21. The food according to claim 20 wherein said food is an edible, plasticized spread.

22. The food according to claim 20 wherein said food is butter-flavored.

23. The food according to claim 12 comprising from 0.001 to 0.5 wt.% based on the total weight of the food, lipophilic flavor.

24. The food according to claim 12 comprising from 0.001 to 0.5 wt.% based on the weight of the emulsion, lipophilic flavor.

25. A food comprising an emulsion having at least two phases, said emulsion including a phase of gelled biopolymer, said gelled biopolymer phase comprising triglyceride fat at a level of 5 wt.% or less based on the weight of the emulsion and a lipophilic flavor.

26. The food according to claim 1 comprising 0.0005% lipophilic flavor.

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